

BEFORE THE
GOVERNING BOARD
BORREGO SPRINGS UNIFIED SCHOOL DISTRICT
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

STEPHEN CLEMENTS
TAMARA DUKE
AMY FULLER
MARIO GONZALEZ
JUSTINE McKUNE
MONICA ROBLES
NAARA VALDEZ (Precautionary Notice),

Respondents

OAH No. 2011031172

PROPOSED DECISION

Roy W. Hewitt, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in Borrego Springs, California on April 20, 2011.

Clifford D. Weiler, Esq. of Atkinson, Andelson, Loya, Ruud & Romo represented the Borrego Springs Unified School District (the District).

All of the respondents were present throughout the hearing and were represented by California Teachers Association staff attorney Robert E. Lindquist, Esq.

The matter was submitted on April 20, 2011.

FACTUAL FINDINGS

1. Carmen Garcia (Superintendent) made and filed the Accusation dated March 25, 2011, while acting in her official capacity as Superintendent of the district.
2. Respondents are certificated District employees.

3. On March 11, 2011, the District's Governing Board (Board) adopted Resolution No. 1011-6, determining that it would be necessary to reduce or discontinue particular kinds of services at the end of the current school year. The Board determined that the particular kinds of services that must be reduced for the 2011-2012 school year were the following full time equivalent (FTE) positions:

<u>Particular Kind of Service (PKS)</u>	<u>Full-Time Equivalent (FTE)</u>
5 th Grade Over-flow Teaching Services	0.48
Music Teaching Services	1.00
K-5 th Grade Teaching Services	2.00
Grades 6-8 Teaching Services	1.17
Grades 9-12 Teaching Services	1.83
<u>Total FTE's</u>	<u>6.48</u>

The services listed above are particular kinds of services, which may be reduced or discontinued within the meaning of Education Code section 44955.

4. The Board's decision to reduce or discontinue the services listed in Finding 3, above, is neither arbitrary nor capricious; rather, it is due to substantial decreases in the operating budget, and is, therefore, a proper exercise of the Board's discretion. The reduction and discontinuation of services is related to the welfare of the District and its pupils, and it has become necessary to decrease the number of certificated employees as determined by the Board. No particular kinds of services were lowered to levels less than those levels mandated by state or federal law.

5. The Superintendent and District considered all positively assured attrition, including resignations, retirements and requests for transfer, in determining the actual number of necessary layoff notices to be delivered to its employees.

6. On March 14, 2011, the Superintendent timely notified respondents, pursuant to California Education Code sections 44949 and 44955, of the District's intent not to reemploy them for the upcoming school year. Accordingly, respondents received written notice, on or before March 15, 2011, notifying them that the Board had recommended they not be re-employed in the upcoming, 2011-2012, school year.

7. On March 25, 2011, respondents were served with a copy of the Accusation, a blank Notice of Defense, a Notice of Hearing and other related materials.

8. Respondents timely requested a hearing and the instant hearing ensued.

9. Each respondent was properly noticed of the date, time and place of the instant hearing.

10. All prehearing jurisdictional requirements have been met.

11. Respondents have been selected for notice of layoff pursuant to their seniority date, which is based on the first day of paid service of each respondent in a probationary position. Respondents were ranked for layoff in the inverse order of their seniority dates.

12. Respondent Amy Fuller (Fuller) asserted that she has the same seniority date as Antonina Efferbeck (Efferbeck); therefore, when criteria for breaking seniority ties are applied she should have been retained over Efferbeck. Fuller's assertion is unavailing. Fuller misunderstood the process. The decision to retain Efferbeck over Fuller was based on a "bumping" analysis, not a tie breaking analysis. Fuller is working for the District teaching Introduction to Spanish and Computer Skills. Efferbeck is working for the District teaching English Language Development, English 9, AVID, and Computer Application. Fuller was identified for layoff because she was teaching Spanish, a PKS that was being discontinued in the District. Consequently, the tie break criteria would only come into play if Fuller possessed the credentials and competency to "bump" Efferbeck. The criteria necessary for "bumping" purposes was set forth in Board resolution 1011-6 as follows:

(a) possession, current filing and issuance no later than March 15, 2011 by the California Commission on Teacher Credentialing, of a preliminary or clear credential for the subject matter into which the employee would bump for the 2011-2012 school year or into which that employee would be reemployed, and

(b) active teaching service in the subject matter into which the individual would bump or into which that employee would be reemployed (said active teaching service including at least one full complete school year of service within this school district other than as a substitute employee, within the last five school years, i.e., 2006-2007 and more recently; service which at the beginning of this current school year and is continuing this school year shall be considered for purposes as a full year of service), and

(c) highly qualified status within the meaning of the No Child Left Behind Act (if appropriate for the position into which the individual would bump or into which that employee would be reemployed), and

(d) if required by the position into which the employee would bump for the 2011-2012 school year or for the position into which that employee would be reemployed, an appropriate EL authorization other than an emergency authorization.

Fuller testified that she is not currently qualified to teach AVID and that she has not taught English in the District for at least one full complete school year, within the last five school years (she had taught English for two years in Big Bear). For these two reasons, considered jointly and severally, Fuller does not meet the “bumping” criteria necessary to “bump” into Efferbeck’s teaching position. Consequently, Efferbeck was properly retained while Fuller was noticed for layoff.

13. Respondent Clements testified that he was concerned about the fact that the music program will no longer exist in the District if he, the only music teacher, is laid off. While his concern is understandable, it is not within the jurisdiction of the Office of Administrative Hearings to second guess the wisdom of the District’s choice of programs to cut or eliminate as long as the District can continue to operate pursuant to Federal and State minimum education requirements. Discontinuation of the music program does not violate any Federal or State educational requirements and is not fraudulent or so palpably unreasonable and arbitrary as to indicate an abuse of discretion as a matter of law. Accordingly, the District’s decision to cut the music program was an appropriate exercise of the District’s discretion.

14. No certificated employee junior to any respondent was retained to perform any services which any respondent was certificated and competent to render.

LEGAL CONCLUSIONS

1. Jurisdiction in this matter exists under Education Code sections 44949 and 44955. All notices and jurisdictional requirements contained in those sections were satisfied.

2. A district may reduce services within the meaning of section 44955, subdivision (b), “either by determining that a certain type of service to students shall not, thereafter, be performed at all by anyone, or it may ‘reduce services’ by determining that proffered services shall be reduced in extent because fewer employees are made available to deal with the pupils involved.” (*Rutherford v. Board of Trustees* (1976) 64 Cal.App.3d 167, 178-179.)

3. Pursuant to section 44995, a senior teacher whose position is discontinued has the right to transfer to a continuing position which he or she is certificated and competent to fill. In doing so, the senior employee may displace or

“bump” a junior employee who is filling that position. (*Lacy v. Richmond Unified School District* (1975) 13 Cal.3d 469)

The District has an obligation under section 44955, subdivision (b), to determine whether any permanent employee whose employment is to be terminated in an economic layoff possesses the seniority and qualifications which would entitle him/her to be assigned to another position. (*Bledsoe v. Biggs Unified School Dist.*, *supra.* at 136-137.)

4. The decision to reduce or discontinue a particular kind of service is not tied in with any statistical computation. It is within the governing authority’s discretion to determine the amount by which a particular kind of service will be reduced or discontinued as long as the District does not reduce a service below the level required by law. (*San Jose Teachers Assn. v. Allen* (1983) 144 Cal.App.3d 627, 635-636.) A school district has wide discretion in setting its budget and a layoff decision will be upheld unless it was fraudulent or so palpably unreasonable and arbitrary as to indicate an abuse of discretion as a matter of law. (*California Sch. Employees Assn. v. Pasadena Unified Sch. Dist.* (1977) 71 Cal.App.3d 318, 322.)

5. The services listed in Factual Finding 3 are each determined to be a particular kind of service within the meaning of Education Code section 44955.

6. Based on the Factual Findings, considered in their entirety, cause exists to reduce the number of certified employees of the District for budgetary reasons.

7. Cause to reduce or discontinue services relates solely to the welfare of the District and its pupils within the meaning of Education Code section 44949.

8. Cause exists to give all named respondents, except for respondent Naara Valdex, who was served with a “precautionary notice,” notice that their services are not needed for the ensuing, 2011-2012, school year.

ADVISORY DETERMINATION

The following advisory determination is made:

Prior to May 15, 2011, notice shall be given to the following respondents that their services will not be required for the ensuing school year due to the budget deficit and the resulting need to reduce and/or discontinue certain services: Stephen Clements; Tamara Duke; Amy Fuller; Mario Gonzalez; Justine McKune; and Monica Robles.

The accusation is dismissed as to respondent Naara Valdez and the layoff notice is rescinded.

DATED: April 26, 2011.

ROY W. HEWITT
Administrative Law Judge
Office of Administrative Hearings